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No. 75-643

Supreme Court, U. S.
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In the

Supreme Court of the United States

October Term, 1975

JAMES L. ALLEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A REHEARING
FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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In Propria Persona

TABLE OF CONTENTS

CITATIONS.....II

QUESTIONS PRESENTED..... 1

STATEMENT OF THE CASE 2

ARGUMENT

I. WHERE THE SUPREME COURT HAS GREATLY EXPANDED THE SCOPE OF STATEMENTS PRODUCIBLE UNDER THE JENCKS ACT AND WHERE THE INFORMATION SOUGHT BY PETITIONER CLEARLY FALLS WITHIN THAT SCOPE, THE SIXTH CIRCUIT COURT OF APPEALS' HOLDING OF HARMLESS ERROR CANNOT BE ALLOWED TO STAND.

II. THE REFUSAL OF TRIAL COURT TO GRANT PETITIONER'S REQUEST FOR ACCESS TO JENCKS ACT MATERIAL PREVENTED EFFECTIVE CROSS EXAMINATION OF WITNESSES AND CONSTITUTES REVERSIBLE ERROR.

III. WHERE THE SIXTH CIRCUIT COURT OF APPEALS HELD THE TRIAL COURT'S DENIAL OF JENCKS ACT MATERIAL TO BE HARMLESS ERROR, AND WHERE THAT HOLDING IS CLEARLY IN CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES, IT CANNOT BE ALLOWED TO STAND.

TABLE OF CITATIONS

Page

CASES:

Alderman v. U.S. 394 U.S. 165,89 S.Ct. 961 22 L Ed 2d 176 (1968)..... 9,

Campbell v. U.S. 365 U.S.85, 5 L ed 2d 428, 81 S.Ct.421(1961)..... 6,11,

Clancy v. U.S. 365 U.S.312, 5 L ed 2d 574,81 S.Ct.645..... 8,9,11,

Goldberg v. U.S. No. 74-6293..... 4,5,

Lewis v. U.S. 340 F 2d 670..... 13,

U.S. v. Aviles 200 F Supp 711, affirmed 315 F 2d 186 13,

U.S. v. Cleveland 477 F ed 2d 310 (1973) 507 F 2d 731 (1974) 7,

U.S. v. Missler 414 F 2d 1293, cert. denied 90 S.Ct.912, 397 U.S. 913, 25 L ed 2d 93..... 14,

U.S. v. Sheer 278 F 2d 65 11,

STATUTES

Title 18 U.S.C. 3500 (Jencks Act) 4,6,7, 8,11,

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PETITION FOR REHEARING FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JURISDICTION

The judgment of the Court of Appeals was entered on September 2, 1975. The jurisdiction of this Court is invoked under 28 USC Sec. 1254(1).

Two orders extending time to file a petition for rehearing for a writ of certiorari signed by Mr. Justice Potter Stewart were dated February 9, 1976 and March 2, 1976.

QUESTIONS PRESENTED

Has the recent Supreme Court decision in Goldberg v. United States so greatly expanded the scope of statements producible under the Jencks Act that a denial of such material cannot be held to be harmless error?

Did the refusal of trial court to grant petitioner's request for access to Jencks Act material constitute reversible error?

Where the Sixth Circuit Court of Appeals' holding of harmless error is clearly in conflict with applicable decisions of the Supreme Court of the United States can that holding be allowed to stand?

STATEMENT OF THE CASE

Petitioner was charged with three counts of federal income tax evasion in violation of 26 U.S.C. Sec. 7201. An indictment was filed on January 10, 1973 and petitioner's motion to suppress evidence obtained by the Internal Revenue Service was denied September 13, 1973. After a motion for continuance had been filed and denied by the Honorable Leroy J. Contie, trial commenced on February 25, 1974, in the District Court for the Northern District of Ohio. The trial concluded on March 14, 1974 with no defense being offered, and a verdict of guilty was returned by the jury on the second and third counts of the indictment. (Count one of the indictment was dismissed prior to trial upon motion of the United States attorney.)

On April 5, 1974 a motion for a new trial was filed on behalf of the petitioner and subsequently denied on April 19, 1974. On May 22, 1974 petitioner was sentenced by the Honorable Leroy Contie to two concurrent terms of six months' confinement, a five thousand dollar ($5,000.00) fine, and four and a half years' probation. The petitioner appealed his conviction to the Court of Appeals for the Sixth Circuit and his conviction was affirmed on September 2, 1975. A petition for a writ of certiorari to the Sixth District Court of Appeals was filed with the Supreme Court of the United States and certiorari subsequently denied on January 19, 1976. The petitioner filed a petition for a rehearing for a writ of certiorari and the matter once again comes before this Honorable Court on that petition.

The petitioner has come before this Honorable Court because of special, <u>intervening</u> circumstances. During the course of the trial

the petitioner requested certain reports and statements pursuant to Title 18 U.S.C. 3500 (The Jencks Act). These documents were denied to the petitioner and on appeal the Sixth Circuit Court of Appeals held that denial to be harmless error. Two things have occurred since that decision: (1) The conflict between the Sixth and Seventh Circuit Courts of Appeal concerning the producibility of Jencks Act material has not yet been resolved and (2) As this brief was being prepared the Supreme Court of the United States was deciding the case of Goldberg v. United States, No. 74-6293, which alters the scope of the Jencks Act.

It is the hope of the petitioner that this Honorable Court will reconsider his petition for certiorari in light of the unresolved conflict between circuits and in light of the court's recent decision in Goldberg v. United States. (March 30, 1976)

I

WHERE THE SUPREME COURT HAS GREATLY EXPANDED THE SCOPE OF STATEMENTS PRODUCIBLE UNDER THE JENCKS ACT AND WHERE THE INFORMATION SOUGHT BY PETITIONER CLEARLY FALLS WITHIN THAT SCOPE, THE SIXTH CIRCUIT COURT OF APPEALS HOLDING OF HARMLESS ERROR CANNOT BE ALLOWED TO STAND.

The petitioner contends that a recent decision of the Supreme Court of the United States has so greatly expanded the scope of reports producible under the Jencks Act that there can be no doubt the documents requested by the petitioner were producible and should have been produced by the government. The petitioner relies on the case of Goldberg v. United States No. 74-6293, decided March 30, 1976, which held that a writing prepared by a government lawyer relating to the testimony of a government witness that has been "signed or otherwise adopted or approved" by that witness is producible under the Jencks Act. This decision departs from prior decisions limiting the scope of Jencks Act material to more formal, signed reports containing statements made by government witnesses.

The Goldberg case creates a new test for determining whether or not a document is producible under the Jencks Act. The Supreme Court of the United States did not concern itself with the form of the information sought by the defense in Goldberg; instead the court sought to discover only whether or not the information sought constituted a "statement" as defined by the Act and whether or not the statement was adopted or approved by the government witness. In vacating the judgment of the Court of Appeals for the Ninth Circuit

and remanding the case for further consideration, the court rejected the government's argument that the Jencks Act was intended to limit the scope of the Jencks decision. Instead, the court cited Campbell v. United States 365 U.S.85, 5 L ed 2d 428, 81 S.Ct. 421 (1961) in pointing out the purpose for the statutory disclosure as a furtherance of "the fair and just administration of criminal justice."

The petitioner suggests that the decision in Goldberg v. United States supports his contention that the statements requested pursuant to Title 18 U.S.C. 3500 were necessary to his defense and that their denial constituted prejudicial error. The Goldberg decision involved testimony of witnesses set to writing by government attorneys. The statements were informal in nature and were not signed by the witnesses, they were merely approved verbally as the interviews progressed. Certainly if the Supreme Court of the United States considers such statements producible under the Jencks Act for the furtherance of "the fair and just administration of criminal justice", then the signed, formal reports of Agent Tracy and Special Agent Pope, who themselves appeared as prosecution witnesses against petitioner must be considered necessary to the petitioner's defense and the just administration of justice. Since the reports requested by the petitioner were necessary to his case, the Sixth Circuit Court of Appeals erred in holding that only harmless error resulted from its denial.

QUESTION

II THE REFUSAL OF TRIAL COURT TO GRANT PETITIONER"S REQUEST FOR ACCESS TO JENCKS ACT MATERIAL PREVENTED EFFECTIVE CROSS EXAMINATION OF WITNESSES AND CONSTITUTES REVERSIBLE ERROR.

The petitioner contends that the trial court's denial of his request for the referral report of Internal Revenue Agent Tracy and the trial court's failure to order the production of the criminal reference report of Special Agent Pope precluded an effective cross examination of witnesses and so prejudiced his case that the denial of these documents must be considered reversible error. The district court, concluding that the referral report was merely an interdepartmental communication not producible under the Jencks Act (18 USC S 3500) refused to order its production. On appeal, the Sixth Circuit Court of Appeals conceded that the reports could have been considered producible under the Jencks Act, but that the failure of the district court to order production of the reports constituted harmless error.

It is the petitioner's contention that the Sixth Circuit Court of Appeals erred in concluding that the denial of Jencks Act documents which were necessary to the petitioner's defense resulted in harmless error. The petitioner relies on the case of the United States v. Cleveland 477 F 2d 310 (1973) 507 F 2d 731 (1974) recently decided by the United States of Appeals for the Seventh Circuit.

In the Cleveland case, which has essentially the same fact situation as the case under consideration, the defendant was indicted and convicted on three counts of tax evasion in violation of 26 U.S.C. 7201. During the course of the trial the defendant requested the

special agent's report to be produced under the authority of The Jencks Act (18 USC 3500), and the judge stated that no portion of the report came within Section 3500 of 18 U.S.C.

On appeal, the Seventh Circuit Court of Appeals twice reversed and remanded the case to the trial court, holding that the special agent's report was a statement within the act and must be tendered directly to the defense without first being reviewed by the trial court.

The Court of Appeals found that the special agent's reports related not only to the agent's direct testimony, but also in what they disclosed about the deductive process which led to the agent's conclusions. The court, citing Clancy v. United States, 365 U.S.312,316, 81 S.Ct. 645, 5 L Ed 2d 574, which was decided in 1961, said:

> "It is not for this court to speculate as to the manner in which these statements might have assisted defense counsel in the course of cross examination. We confine our attention to a determination of whether the statements relate to the witness' direct testimony and if so whether it is perfectly clear that defendant was not prejudiced by their nondisclosure..."

In reversing and remanding the case of The United States v. Cleveland the Seventh Circuit Court of Appeals refused to find harmless error in the denial of defense material relating to the witness' direct testimony. Absent a showing by the government that it was perfectly clear that the defendant had not been prejudiced by the error

the court found the error to be prejudicial. The Seventh Circuit Court reached this conclusion in Cleveland II by applying prior decisions of The Supreme Court of the United States in Clancy v. United States, 365 U.S. 312, 81 S.Ct. 645, 5 L Ed 2d 574 (1961) and Alderman v. United States U.S. 165, 182, 89 S.Ct. 961, 22 L Ed 2d 176 (1968).

In the case at bar, the United States v. James L. Allen, the Sixth Circuit Court of Appeals reached a decision contrary to that of the Seventh Circuit Court of Appeals on virtually the same set of facts. James Allen was convicted of attempting to evade income taxes for the years 1967 and 1968 in violation of 26 U.S.C. 7201. During the trial the petitioner requested Internal Revenue Agent Tracy's referral report, but it was denied on the grounds that it was not Jencks Act material. The Sixth Circuit Court of Appeals held that the referral report was indeed within the scope of 18 U.S.C. 3500 but found its denial to the defense to be harmless error. In reaching this decision the court did not apply the Clancy or Alderman cases; instead the court merely gave its opinion as to the value of the reports:

> "It is our opinion that even though the entire reports could have been rendered producible under the Jencks Act, the failure to order production was harmless error."

This finding has no legal basis. Had the Sixth Circuit Court of Appeals applied the Supreme Court decisions in Clancy and Alderman it could not have reached its conclusion that the denial of Jencks Act material constituted harmless error in the case of United States v. James L. Allen.

Once the Sixth Circuit Court of Appeals had decided that the requested documents fell within the scope of the Jencks Act, it was not within its power to speculate as to the manner in which these statements might have assisted defense counsel in the course of cross examination. The court could only inquire as to whether or not it was perfectly clear that the petitioner's case was not prejudiced by the nondisclosure of the reports. There is nothing in the record to suggest that the petitioner's case was not prejudiced by the denial of the government reports and the Sixth Circuit Court of Appeals could not have been certain that James L. Allen's case was free from prejudice as the result of the trial court's error.

III

WHERE THE SIXTH CIRCUIT COURT OF APPEALS HELD THE TRIAL COURT'S DENIAL OF JENCKS ACT MATERIAL TO BE HARMLESS ERROR, AND WHERE THAT HOLDING IS CLEARLY IN CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES, IT CANNOT BE ALLOWED TO STAND.

The petitioner contends that the Sixth Circuit Court of Appeals erred in deciding that the trial court's denial of Jencks Act documents was merely harmless error. The Supreme Court of the United States has previously considered that question in a similar case and reached a contrary result. In Clancy v. United States, 365 US 312, 5 L ed 2d 574, 81 S.Ct.645 (1961) the Supreme Court was faced with a question analogous to that presented by the case under consideration. In the Clancy case, which also involved a charge of income tax evasion, the court was asked to decide whether certain signed memoranda of interviews held with Clancy were covered by the Jencks Act. The court, citing Campbell v. United States, 365 US 85, 5 L ed 2d 428, 81 S.Ct.421 (1961) and United States v. Sheer, 278 F 2d 65, 67 held that the documents were included within the scope of the Jencks Act (Title 18 USC 3500). In reaching its decision the Supreme Court of the United States quoted the Senate Report 569 on the bill which became the Jencks Act:

> "The committee believes that legislation would clearly be unconstitutional if it sought to restrict due process. On the contrary, the proposed legislation reaffirms the decision of the Supreme Court in its holding that a defendant on trial in a criminal prosecution is entitled to reports and state-

> ments in possession of the Government touching the events and activities as to which a government witness has testified at the trial." "The purpose of the proposed legislation is to establish a procedural device that will provide such a defendant with authenticated statements and reports of government witnesses which relate directly upon his testimony."

In holding that the petitioners were entitled to a new trial as the result of the denial of certain statements to which they were entitled under the Jencks Act, the court ignored the government's contention that the denial constituted only harmless error. The court said "... since the production of at least some of the statements withheld was a right of the defense it is not for us to speculate whether they could have been utilized effectively." In the present case, when the Sixth Circuit Court of Appeals held that although the material requested was indeed Jencks Act material that its denial should be considered only harmless error, it was in violation of the letter and the spirit of the law set out in Clancy v. United States. In finding mere harmless error in the withholding of the referral report of Agent Tracy and the Criminal Reference Report of Special Agent Pope sought by petitioner for use in cross examination of the witnesses, the Sixth Circuit Court of Appeals disregarded the Supreme Court's caution against "speculating whether they could have been utilized effectively."

The petitioner maintains that the Sixth Circuit Court of Appeals' decision that the withholding of material requested pursuant to Title 18 U.S.C. 3500 resulted in harmless error was based on naked speculation as to whether or not the reports would have been helpful to the petitioner's case. This type of speculation is expressly forbidden by the Supreme Court in Clancy v. United States, and since the testimony presented by Agents Tracy and Pope was the basis of the petitioner's conviction and since the petitioner was unable to effectively cross-examine these men without the aid of the reports, the decision of the Sixth Circuit Court of Appeals should not be allowed to stand.

The petitioner concedes that under certain circumstances harmless error may result when a defendant is deprived of material requested under 18 U.S.C. 3500. The petitioner concedes that every violation of protections afforded by this section does not in and of itself amount ipso facto to a violation of due process. It has been held, for instance, that harmless error resulted where defendant's guilt of the charge was established beyond reasonable doubt by competent testimony other than that given by the witness who made the statements. Lewis v. United States 340 F 2d 678 (1965)

It has been held that harmless error resulted when virtually the entire contents of requested notes corresponded with grand jury testimony of witnesses which was turned over to the defense. United States v. Aviles 200 F Supp 711, affirmed 315 F 2d 186. It has also been held that only harmless error

occurred when the government inadvertently failed to produce certain pretrial statements of witnesses when they differed only in minor details from statements produced. United States v. Missler C.A. Md 1969, 414 F 2d 1293, cert.denied 90 S.Ct 912, 397 U.S. 913, 25 L ed 2d 93.

While conceding that harmless error may occur in Jencks Act cases the petitioner distinguishes these cases from the case of the United States v. James L. Allen, now under consideration by the Honorable Court. In the case at bar the petitioner's guilt was not established beyond reasonable doubt by testimony other than that of witnesses whose reports were withheld. In fact, without the testimony of the two government agents there would have been no case against Mr. Allen whatsoever. The trial record shows that the reference report of Agent Tracy was requested and that request was denied. The brief in support of petitioner's motion for a new trial reflects the fact that petitioner's attorney requested the criminal reference report of Special Agent Pope and that that request was also denied. Thus, the government agents were allowed to present testimony highly damaging to the petitioner while he was unable to effectively cross-examine them as to the contents of their official reports.

The present case is also distinguishable from the harmless error cases in respect to grand jury testimony. In the case under consideration, Agent Pope's criminal reference report was especially necessary to Allen's defense because Pope's testimony before the grand jury was not recorded. Either inadvertently or purposely, no record of his testimony was made although the testimony of other witnesses was preserved. With neither the grand jury testimony nor Pope's criminal reference report to work with the petitioner's

cross-examination had to be futile.

Finally, the case of United States v. James L. Allen is readily distinguishable from Jencks Act cases where harmless error resulted from the inadvertent withholding of all or part of a government report containing statements made by a prosecution witness. There was no honest mistake involved in the Allen case; specific reports were requested during the trial and they were withheld from the defense. No clerical errors were involved, the petitioner was simply refused access to information necessary to his case.

The thrust of the Jencks Act information cases which have held that harmless error resulted from withholding requested statements is simple - in these cases only harmless error was found because it appeared that the defense already had gained access to the desired material in some other form. Since the defense was not really deprived of the information the error was harmless. In the case under consideration the error was not harmless. The petitioner was deprived completely of information necessary to his defense and was therefore unable to effectively confront and cross-examine his accusers.

CONCLUSION

Wherefore, it is submitted that this court should grant this petition and issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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April 7, 1976